Supreme Court, U.S.
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No. 97-____

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1997

JOHN P. HASELOW,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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36 pp

QUESTIONS PRESENTED FOR REVIEW

1. Whether this Court has jurisdiction to consider a petition for a writ of certiorari when the Court of Appeals has denied the petitioner a certificate of appealability.

2. Whether a petitioner who alleges ineffective assistance of counsel in entering a guilty plea and foregoing his right to trial must establish that he would have been acquitted at trial.

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PETITION FOR WRIT OF CERTIORARI

Petitioner John P. Haselow respectfully requests that the Court issue a writ of certiorari to review the judgment of the United States Court of Appeals denying post-conviction relief under 28 U.S.C. §2255.

OPINIONS BELOW

The unpublished decision of the district court denying relief on the petition is in Appendix B.

The unpublished decision of the district court denying a certificate of appealability is in Appendix C.

The unpublished order of the United States Court of Appeals denying a certificate of appealability is in Appendix D.

JURISDICTION

The Court of Appeals entered judgment on November 4, 1997, denying a certificate of appealability. This Court's jurisdiction is invoked under 28 U.S.C. §§2255(1), 2101(c), and 1651(a), as well as Supreme Court Rule 13.3. As he did below, Mr. Haselow asserts the deprivation of rights secured by the United States Constitution and 28 U.S.C. §2255.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This petition concerns the construction and application of the right to effective assistance of counsel, found in the Sixth Amendment to the United States Constitution, which

provides:

> In all criminal prosecutions, the accused shall enjoy the right ... to have the Assistance of Counsel for his defence.

STATEMENT OF THE CASE

Mr. Haselow entered a guilty plea in 1990 to a controlled substances charge, income tax charges, and a gun charge. He was sentenced to 262 months in prison.

On April 22, 1997, Mr. Haselow filed a petition (his first) under 28 U.S.C. §2255, challenging his guilty plea as the product of ineffective assistance of counsel (the narrative portion of his petition is reprinted in Appendix A). Since his petition was filed only days before the statute of limitations for filing such a petition expired, his filing consisted solely of sworn responses to the pre-printed form for section 2255 cases. His initial sworn filing did not contain any legal discussion, affidavits from third parties, or excerpts from the record, since the pre-printed form specifically instructs that those materials are not to be part of the responses to the form.

On April 29, 1997, only seven days after its filing, the district court denied his petition without a hearing and

without any response from the government.

Mr. Haselow's sole claim in his petition was that his attorney in 1990 told him that, because of his prior criminal record, he faced a sentence of natural life in prison if convicted of the charged offenses. Although Mr. Haselow wanted to go to trial, he did not want to risk trial if conviction exposed him to a sentence of natural life in prison. For that reason, he accepted a plea bargain under Federal Rule of Criminal Procedure 11(e)(1)(C) that gave him a guaranteed sentencing guidelines range of 210-262 months in prison.[1]

Mr. Haselow later found out that his attorney had erroneously advised him about the impact of his criminal history. Mr. Haselow's prior convictions did not subject him to a natural life sentence. The attorney's appraisal of the situation was incorrect and substantially below the level required for effective assistance of counsel.

The district court denied Mr. Haselow's section 2255 petition, since the district court believed that the advice as to

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[1] Of course, under the provisions of Rule 11(e)(1)(C), the trial judge could ultimately reject the plea agreement, but once the trial judge accepted the plea agreement, she was bound to sentence Mr. Haselow to the agreed upon sentence contained in the parties' agreement. As it turned out, the district judge accepted their agreement and sentenced Mr. Haselow to the maximum sentence within the agreed range of 210-262 months.

the sentence *could* have been accurate (the district court's opinion is reprinted in Appendix B). Ignoring Mr. Haselow's sworn allegations in the petition as to what his attorney had told him and as to what impact that advice had on his decision to plead guilty, the district court spun out a speculative and conjectural basis for concluding that the attorney *might* have given him the correct advice if the attorney had not relied on his mistaken beliefs as to the defendant's maximum sentence and had instead presented to the client a worst case scenario of the sentencing judge's resolution of other factors that might have impacted the calculation of the sentence under the sentencing guidelines, such as the extent of relevant conduct and defendant's role in the offense.

The district court also reasoned on an alternative basis that there had been no showing in the petition that, had Mr. Haselow gone to trial, he would have been acquitted. The district court believed as a matter of law that the petitioner must show the outcome or probable outcome of a trial that never occurred.

Mr. Haselow sought a certificate of appealability from the district court as a predicate to taking an appeal of its decision. Acting once again without a response from the government, the district court denied this request, essentially restating its reasons for denying relief on the merits, but also

discounting its original statement that the petition must demonstrate that he would have been acquitted had he gone to trial (the district court's opinion is reprinted in Appendix C). The district court went so far as to state that Mr. Haselow's counsel was presenting a "red herring" by analyzing and responding to this portion of its earlier opinion on the merits.

Mr. Haselow then filed a timely notice of appeal and requested that the United States Court of Appeals issue a certificate of appealability. Mr. Haselow supported this request with a legal memorandum, which set forth the relevant case law and a discussion of the proceedings below. The government was not asked to file a response to this request for a certificate of appealability, and, as in the district court, filed no response to Mr. Haselow's request.

On November 4, 1997, the Seventh Circuit denied Mr. Haselow's request for a certificate of appealability. The Seventh Circuit gave no explanation for its denial, except to state, "This court has reviewed the final order of the district court and the record on appeal. We find no substantial showing of the denial of a constitutional right. 28 U.S.C. §2253(c)(2)." The Seventh Circuit's order (reprinted in Appendix D) also denied a request to proceed on appeal in forma pauperis, although Mr. Haselow had made no such

request to proceed in forma pauperis, never intended so to proceed, and was ineligible to proceed in that fashion.

REASONS FOR ALLOWANCE OF THE WRIT

I.

THIS COURT HAS JURISDICTION TO GRANT RELIEF.

Counsel is aware that this Court has raised the issue in *Hohn v. United States*, 118 S.Ct. 361 (1997) (Docket No. 96-8986), as to whether it has jurisdiction when the Court of Appeals has denied a certificate of appealability. This Court has received briefs from the parties in *Hohn*, including the government, which has argued that this Court has jurisdiction, at a minimum, under the All Writs Act, 28 U.S.C. §1651(a), to grant a common law writ of certiorari, even if the Court does not have jurisdiction under 28 U.S.C. §1254(1) to issue a statutory writ of certiorari. This Court has invited a brief from a designated member of the bar of this Court to present the argument that it does not have jurisdiction when the Court of Appeals has denied a certificate of appealability. 118 S.Ct. 361 (1997). At this date that brief remains to be filed.

Counsel in this case will not elaborate on the very full

arguments already presented in *Hohn* by Hohn's counsel and by the government. This Court has previously granted certiorari in cases in which the Court of Appeals had denied a certificate of probable cause. *E.g.*, *Lozada v. Deeds*, 498 U.S. 430 (1991). That practice supports this Court's authority to consider this case, even though the Court of Appeals denied a certificate of appealability. Mr. Haselow further relies on the arguments and authorities already presented in *Hohn*. He asserts that this Court has jurisdiction to grant a writ of certiorari, either under the statutory grant found in 28 U.S.C. §1254(1) or a common law writ under the authority of the All Writs Act. Alternatively, Mr. Haselow requests that this Court issue a certificate of appealability under 28 U.S.C. §2253(c)(1), so that the Court may proceed to a consideration of this certiorari petition.

II.

THE DECISION BELOW CONFUSES THE APPROPRIATE LEGAL STANDARD FOR DETERMINING PREJUDICE IN EFFECTIVE ASSISTANCE OF COUNSEL CLAIMS.

The district court's decision in this case was based on a misreading of *Hill v. Lockhart*, 474 U.S. 52 (1985). This

misreading, approved by the Seventh Circuit, creates a serious conflict among the Circuits as to the meaning of *Hill*.

The district court held that, to satisfy the "prejudice" prong of the ineffective assistance of counsel standard, more generally set out in *Strickland v. Washington*, 466 U.S. 668 (1984), Mr. Haselow had to establish that he would have received a more favorable result than life in prison if he had gone to trial. Alluding in one sentence to the possibility that "[a]t least nine other persons could have testified" against Mr. Haselow at a trial, the district court denied an evidentiary hearing and denied relief.

This Court set up no such impossible standard in *Hill*. Rather, the test established in *Hill* is whether, "but for counsel's errors, he [the defendant] would not have pleaded guilty and would have insisted on going to trial." 474 U.S. at 59. In *Hill*, this Court denied habeas corpus relief because the petitioner did not allege that, if he had received the correct advice as to parole eligibility, he would have refused to plead guilty.

> Petitioner did not allege in his habeas petition that, had counsel correctly informed him about his parole eligibility date, he would have pleaded not guilty and insisted on going to trial. He alleged no special circumstances that might support the conclusion that he placed

> particular emphasis on his parole eligibility in deciding whether or not to plead guilty. Indeed, petitioner's mistaken belief that he would have become eligible for parole after serving one-third of his sentence would seem to have affected not only his calculation of the time he likely would serve if sentenced pursuant to the proposed plea agreement, but also his calculation of the time he likely would serve if he went to trial and were convicted.

474 U.S. at 60.

In terms of its holding, *Hill* made no requirement that the habeas petitioner establish that he would have been acquitted or had a good chance of being acquitted had he gone to trial. *Hill* does seem to contain an ambiguity. It is unclear whether, had the petitioner made the allegation that he would have pleaded not guilty, the Court must or could examine the strength of the case against him. This Court's quotation from a Seventh Circuit case, *Evans v. Meyer*, 742 F.2d 371, 375 (7th Cir. 1984), quoted at 474 U.S. at 59, which involved counsel's failure to explore a potential affirmative defense, might imply that a petitioner's stated resolve to go to trial, after the fact, is not binding when it is inconceivable that the defendant would have gone to trial in any event. In *Evans* the Seventh Circuit thought it inconceivable that the defendant would have gone to trial and presented

an affirmative defense of voluntary intoxication; hence, counsel's failure to raise this remotely applicable defense for the defendant to consider did not invalidate his guilty plea.

Relying on language in *Key v. United States*, 806 F.2d 133, 139 (7th Cir. 1986), the district court in this case has taken this ambiguity a step further. Under its reading of *Hill*, the petitioner must do more than negate the inconceivability of going to trial, the standard in *Evans*. Rather, the petitioner must establish a probable acquittal.

The First Circuit has focused instead on whether the defendant's professed desire to go to trial was reasonable. In *United States v. Giardino*, 797 F.2d 30 (1st Cir. 1986), the defendant's attorney allegedly lied to him about the anticipated testimony of a potential defense witness, and defendant decided to plead guilty. The First Circuit did not balance the testimony of the potential defense witness against the testimony of the government's witnesses or evaluate its persuasiveness in any way. That would have been an impossible task -- and not the task set forth in *Hill*. The First Circuit looked at the overall reasonableness of the defendant's claim that he would have gone to trial if the attorney had not lied to him and concluded that it would be reasonable to want to go to trial and present the witness' exculpatory testimony.

This Court should clarify (or reinforce) *Hill's* requirements on the prejudice prong in the context of a guilty plea. Mr. Haselow submits that when a defendant establishes that he received erroneous advice about the possibility of a prison term of natural life and that he took a guilty plea to avoid that result (erroneously described), there should be no requirement that he establish that he would have been acquitted at trial. The limitation is that suggested in *Hill*: if it is inconceivable that a person, having the correct advice, would go to trial, then relief may be denied.

Any decision to go to trial involves a complex mix of factors, including not only the length of sentence, but also the strength of the evidence. Even if the evidence is very strong, a defendant may reasonably decide to go to trial, depending on the sentence to which he would be exposed. To take an extreme example, if the attorney erroneously tells the defendant that he is facing the death penalty, when in reality the maximum sentence is five years, it would still be reasonable for a fully informed defendant to go to trial on a five-year case, even though the evidence is overwhelming. The district court's decision in this case ignored the nuanced decision that is often required when the defendant, relying on the advice of his attorney, makes a decision as to whether to go to trial or plead guilty.

The district court's decision in this case is additionally objectionable because even on the standard used by the district court, it denied the defendant any opportunity to develop the facts. Apparently, the district court thought that Mr. Haselow would not have been acquitted on any of the counts. Yet there was nothing in the record to support that conclusion, and the district court gave Mr. Haselow no opportunity to take issue with the district court's conclusory findings. When a court relies on matters not of record in dismissing a petition, then its decision constitutes a determination of a motion for summary judgment under Federal Rule of Civil Procedure 56, and the petitioner must be given the procedural safeguards surrounding the hearing and decision of motions for summary judgment. *McBride v. Sharpe*, 25 F.3d 962, 968-70 (11th Cir. 1994) (*en banc*). Mr. Haselow did not receive this required safeguard.

The district court's willingness to decide this case on facts not of record was further illustrated by its highly imaginative and speculative rendition of why the attorney's advice as to the possibility of a natural life sentence might have been correct, but for reasons other than the reasons given by the attorney. Mr. Haselow pleaded guilty because, given what the attorney erroneously told him about the consequences of his criminal history, Mr. Haselow did not

wish to take the chance of life in prison. The district court misread *Hill*, when it suggested that the attorney could have hypothetically informed Mr. Haselow that he faced life in prison, or close to life in prison, based on sentencing factors other than the prior criminal record, and that Mr. Haselow might hypothetically have decided to plead guilty on the basis of this hypothetical advice.

There is, of course, a significant difference between the advice actually given by Mr. Haselow's attorney and the advice that a hypothetical attorney could have rendered. Mr. Haselow knew that he had prior convictions, and those convictions were record facts which the attorney could verify and then analyze in light of applicable law. As it turned out, the attorney gave the wrong advice about the legal effect of those undisputed convictions.

By contrast, in the hypothetical advice constructed by the district judge, each of the factors that could have led to a lengthy prison sentence was a matter of some uncertainty. It would be difficult to say with certainty what amount of drugs would be attributed to Mr. Haselow at sentencing. It would also be difficult to say with certainty whether he had a leadership role. Even if one puts these difficulties aside, the fact remains that the petitioner made specific allegations as to the advice given him by his attorney, and the district court

refused to grant a hearing because it chose to construct imaginary advice that might have led Mr. Haselow to the same conclusion, but for far different reasons. Although evidentiary hearings in habeas proceedings are often an unwelcome chore, no one has ever suggested that they can be avoided by the district court's creating the sort of imaginary record that was created in this case.

CONCLUSION

For the reasons stated, the Court should grant a writ of certiorari to review the decision of the Court of Appeals.

Dated at Milwaukee, Wisconsin, February 2, 1998

Respectfully submitted,

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APPENDIX A

ATTACHMENT FOR QUESTION 12
SUPPORTING FACTS

My attorney told me that under the sentencing guidelines (U.S.S.G. §4B1.1) I was a "career offender" because of two prior drug convictions and that I would be exposed to a guidelines sentence of 360 months to natural life, if I went to trial and was convicted as a career offender. A sentence of natural life would mean that I would never leave prison. Since I did not want to receive a sentence of natural life, or even take the risk of receiving a sentence of natural life, I entered into a plea agreement under Rule 11(e) that required the Court to sentence me within a range of 210 to 262 months and removed the possibility of my receiving a natural life sentence under the guidelines. I have since discovered that my criminal history did not make me a career offender under the guidelines, and my guidelines, properly calculated, did not allow for a sentence of natural life. My attorney mistakenly believed that my prior drug conviction in North Carolina was the sort of conviction that would be counted under the guidelines toward career offender status. In fact, my conviction in North Carolina was for simple possession of drugs, not for delivery nor for possession with

intent to deliver. Without this North Carolina conviction, I was not a career offender under Guidelines §4B1.1, and could not be sentenced to natural life in prison. The possibility of a natural life sentence as a career offender was the only reason I pleaded guilty. Had I the correct information about career offender status, I would not have pleaded guilty.

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APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

UNITED STATES OF AMERICA,

OPINION AND ORDER

Plaintiff,

89-CR-130-C-01
89-CR-131-C-01
97-C-0279-C

v.

JOHN P. HASELOW,

Defendant.

Defendant John P. Haselow has filed a motion pursuant to 28 U.S.C. §2255 in which he seeks vacation of his sentence on the ground that he was denied the effective assistance of counsel. He alleges that his attorney advised him to plead guilty to a plea agreement that set the sentencing guideline range at 210 to 262 months and warned him that if he went to trial, he would be exposed to a guidelines sentence of 360 months to life because he would be convicted as a career offender under U.S.S.G. §4B1.2. Defendant has since learned that his prior criminal history did not make him a

career offender; a prior drug conviction in North Carolina was for possession only and would not have counted as a "controlled substance offense" under the guideline. I conclude that even if defendant could prove his allegation that his counsel gave him erroneous advice about the North Carolina conviction, counsel's assessment of the sentence defendant might receive if he went to trial was accurate; therefore, it cannot be said that defendant lacked the effective assistance of counsel or that his guilty plea was not knowledgeable.

RECORD EVIDENCE

The record shows that defendant was charged in 1989 in two indictments. In the indictment returned in 89-CR-131, he was charged with possession with intent to distribute cocaine, possession of a firearm in relation to a drug crime and possession of a firearm by a convicted felon. In 89-CR-130, he was charged with one count of conspiracy to distribute cocaine, one count of possession with intent to distribute hashish oil and four counts of false statements on income tax returns. Defendant retained counsel to represent him. In May 1990, he entered pleas of guilty to the possession with intent to distribute cocaine and possession of a firearm by convicted felon charges in the indictment in 89-CR-131 and

to two counts of making false statements on income tax returns in 89-CR-130. In the plea agreement, the parties stipulated that the appropriate offense level would be 36 and defendant's criminal history category would be II, producing a guideline sentencing range of 210-262 months after the level had been reduced by two for acceptance of responsibility and enhanced by two for role in the offense. The parties agreed that the offense did not occur before July 1988 and that the firearm possessed by defendant was not used in the offense. the government agreed to move for a downward departure pursuant to U.S.S.G. §5KI.1 if defendant provided information helpful to the government.

Defendant received a sentence of 262 months. The government never moved for a downward departure. When he was sentenced in July 1990, he was 36 years old.

In related cases, ten other participants in the cocaine distribution conspiracy entered pleas of guilty. Many of these people provided extensive evidence of the conspiracy to law enforcement officers.

OPINION

Defendants filing motions to vacate their sentence must prove cause and prejudice for their failure to raise the challenge on direct appeal. Prewitt v. United States, 83 F.3d

812, 816 (7th Cir. 1996) (citing Reed v. Farley, 114 S. Ct. 2291, 2300 (1994) (collateral relief unavailable to petitioner, whether state or federal, who fails to raise claim on direct review, unless petitioner establishes cause for waiver and actual prejudice resulting from alleged violation)). Defendants whose claims rest on the asserted ineffectiveness of counsel can raise such a claim for the first time in a collateral proceedings if they can show that their claims are based upon extrinsic evidence that was not part of the trial record. Taglia v. United States, 922 F.2d 413, 418 (7th Cir. 1991) (defendant not barred from claiming ineffectiveness of counsel for the first time in postconviction proceeding if claim is based on extrinsic evidence; such a claim cannot be decided on basis of record compiled in trial court). Defendant's claim that he was not given accurate information when he made his decision to plead is not one that could have been heard on appeal; therefore, he is not barred from bringing the challenge in the form of a collateral motion.

In order to pursue his §2255 challenge, however, defendant must allege facts that state a viable challenge to the validity of his sentence. He contends that he was denied the effective assistance of counsel, but to prove such a claim he would have to show both that his attorney's representation of

him fell below an objective standard of reasonableness and that a reasonable probability exists that the result of the proceeding would have been more favorable to him had he not relied on the erroneous advice. Hill v. Lockhart, 474 U.S. 52, 58 (1985) (extending holding of Strickland v. Washington, 466 U.S. 668 (1984), to guilty pleas); Key v. United States, 806 F.2d 133, 139 (7th Cir. 1986). His claim founders at the outset when he asserts that it was wholly unreasonable for his attorney to have advised him that he would face a potential sentence of 360 years to life because he had the three predicate crimes that required classification as a career offender under §4B1.1. Depending on the information defendant gave his counsel, this advice might have been correct. If, for instance, defendant's memory of his prior crime was that he had been convicted of distributing, it would have been accurate for counsel to tell him that he would likely be considered a career offender. It would have been equally accurate for counsel to have told his client that even if it appeared that defendant had been convicted of possession only, the facts might show otherwise and the court might consider the prior crime a controlled substance offense within the meaning of the career offender guideline.

But even assuming that counsel knew that the North

Carolina conviction had been for possession only, and therefore should have realized that it would not count as a predicate crime, his misapprehension of this fact is immaterial because the advice he gave defendant was sound. Defendant was facing two counts with mandatory minimum sentences of ten years each, one count (using a firearm in connection with a drug crime) that required a five year term to be served consecutively to any other sentence and five other counts. Conviction on all counts could have meant a sentence of at least five years more than the plea bargain because of the mandatory consecutive sentence for the use of a gun in relation to a drug crime. (Although this conviction might not have held up after Bailey v. United States, 116 S.Ct. 501 (1995), was decided, a conscientious lawyer could not have predicted such a result in 1989 and would have had to consider the additional five-year sentence when assessing potential penalties.)

Without the parties' agreement in the plea bargain that defendant's criminal conduct went back only to July 1988, it is likely that the court would have been free to consider defendant's conduct as far back as 1982, in which case the North Carolina conviction would have added two points to defendant's history category and put him into category III

(two points are added for committing an offense while under a term of probation for the North Carolina conviction). Assuming that the stipulated drug amount would not have changed, defendant's offense level would have remained 36, but his actual role in the offense as a leader and organizer of a criminal activity that involved four or more participants would have increased his offense level to forty and he would not have been eligible for a two-point reduction for acceptance of responsibility. Offense level 40 and criminal history category III produce a guideline range of 360 months to life, exactly what defendant says his counsel warned him might be the case. Moreover, if defendant had been convicted of the §924(c) (use of a firearm during or in relation to a drug crime) charge, he would have been eligible for a five-year sentence to be imposed in addition to his sentences for the drug offenses. If he had been convicted on all four tax counts, he could have received an additional three to twelve years, depending whether the maximum sentence of three years was imposed for each count and whether the sentences were ordered to run consecutively to each other and to the sentences on the drug and gun charges. The truth is that defendant faced a sentence far in excess of his natural life, no matter how the North Carolina sentence factored into the

calculations. It was a prodigious feat for his attorney to negotiate a plea bargain that brought the sentence down to 262 months. Few defendants in this district have had assistance as effective as that provided defendant.

Moreover, to prevail on a claim of ineffectiveness of counsel, defendant would have to show more than that he would have refrained from entering into the plea bargain; he must show that the ultimate results of the prosecution would have been more favorable had he gone to trial. Gargano v. United States, 852 F.2d 886, 890 (7th Cir. 1988) (mere allegation that defendant would have rejected plea agreement and gone to trial does not show prejudice). Defendant has not alleged anything to suggest that he would have been better off going to trial. Nothing in the record indicates that the government would have had any difficulty proving the case against him, despite the considerable trial skills of his retained counsel. At least nine other persons could have testified against defendant (and no doubt would have been eager to do so in order to earn downward departures for assisting the government). Cf. United States v. Rodriguez-Luna, 937 F.2d 1208, 1215 (7th Cir. 1991) (defendant failed to show that his attorney's alleged misrepresentations about effect of guilty plea prejudiced him because defendant's

rejection of plea agreement would not have changed his sentence but only delayed it in light of overwhelming evidence that he possessed one kilogram of cocaine).

ORDER

IT IS ORDERED that defendant John Haselow's motion for vacation of his sentence pursuant to 28 U.S.C. §2255 is DENIED for his failure to show that the sentence is subject to collateral attack.

Entered this 29th day of April, 1997.

BY THE COURT:

BARBARA B. CRABB
District Judge

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APPENDIX C

IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

UNITED STATES OF AMERICA,

OPINION AND ORDER

Plaintiff,

89-CR-130-C-01
89-CR-131-C-01
97-C-0279-C

v.

JOHN P. HASELOW,

Defendant.

Defendant John P. Haselow has filed a notice of appeal from the denial of his motion for vacation of his sentence pursuant to 28 U.S.C. § 2255 and for a certificate of appealability. Although the Court of Appeals for the Seventh Circuit has never addressed the question whether district judges have the authority to issue such certificates in light of the ambiguous language in 28 U.S.C. § 2253 ("unless a circuit justice or judge issues a certificate of appealability. . ."), the court has assumed that they do. See, e.g.,

Herrera v. United States, 96 F.3d 1010 (7th Cir. 1996) (discussing whether district judge acted properly in declining to issue a certificate of appealability in a § 2255 proceeding in which the notice of appeal predated the date on which the Antiterrorism and Effective Death Penalty Act, Pub.L. 104-32, 110 Stat. 1214, took effect). This conclusion is in accord with the other circuits that have addressed the issue directly. United States v. Asrar, 108 F.3d 217 (9th Cir. 1997 (district judges have authority to issue certificate of appealability in § 2255 proceedings); Houchin v. Zavaras, 107 F.3d 1465 (10th Cir. 1997) (district judges have authority to issue certificate of appealability in § 2254 proceedings; reserving opinion on their authority to do so in § 2255 proceedings); Lozada v. United States, 107 F.3d 1011, 1014-15 (2d Cir. 1997) (district judges have authority to issue certificate of appealability in § 2255 proceedings); Lyons v. Ohio Adult Parole Authority, 105 F.3d 1063, 1068 (6th Cir. 1997) (district judges have authority to issue certificate in § 2254 proceedings); Else v. Johnson, 104 F.3d 82 (5th Cir. 1997) (same).

It is implicit in Herrera, 96 F.3d at 1012, that the Seventh Circuit will take the position adopted by the Second and Tenth Circuits that the applicable standard for issuing a

certificate of appealability are those set out in Barefoot v. Estelle, 463 U.S. 880 (1983). In Barefoot, the Supreme Court held that a certificate should issue if the appeal presents at least one question of some substance that would be debatable among reasonable jurists or that a court could resolve in a different manner or that is adequate to deserve encouragement to proceed further or that is not squarely foreclosed by statute, rule, or authoritative court decision or lacking any factual basis in the record. Applying this standard, I conclude that defendant's request must be denied. Defendant's claim is straightforward. His attorney gave him inaccurate advice that led him to plead guilty. Had he not received this inaccurate advice, he would not have pleaded guilty but would have gone to trial. His entire claim rests on the asserted inaccuracy of the advice he was provided, but that advice was not inaccurate. It might have been in error on one point, but the inaccuracy of that one point did not render the advice inaccurate in whole. Defendant's counsel was correct when he told defendant he faced a possible sentence of at least 360 months. Defendant chose to plead guilty rather than expose himself to a sentence of that length.

Defendant's focus on my alleged misreading of Hill v. Lockhart, 474 U.S. 52, 59-60 (1985), is a red herring.

Defendant's case founders before reaching Hill because he cannot prove that his attorney gave him information that would have misled him in evaluating his prospects. Although I continue to believe that my interpretation of Hill conforms with Seventh Circuit precedent, it is an ancillary question. It is not necessary to decide whether defendant could prove the likelihood that he would have been acquitted; that is simply an alternative basis for concluding that defendant has no viable claim. In summary, I cannot say that defendant's § 2255 motion presents any substantial question debatable among jurists of reason or that it is one that a court could resolve in a different manner. I can say that the motion lacks any factual basis. Accordingly, defendant's request for a certificate of appealability must be denied.

ORDER

IT IS ORDERED that defendant John Haselow's request for a certificate of appealability is DENIED.

Entered this 18th day of July, 1997.

BY THE COURT:

BARBARA B. CRABB
District Judge

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APPENDIX D

United States Court of Appeals
For the Seventh Circuit
Chicago, Illinois 60604
Submitted September 19, 1997
Decided November 4, 1997

Before

Hon. WILLIAM J. BAUER, Circuit Judge

Hon. FRANK H. EASTERBROOK, Circuit Judge

JOHN P. HASELOW, Petitioner-Appellant,		Appeal from the United States District Court for the Western District of Wisconsin.
No. 97-2883	v.	No. 97 C 279
UNITED STATES OF AMERICA, *Respondent-Appellee.*		Barbara B. Crabb, *Judge.*

Petitioner moved to vacate, correct, or set aside a sentence pursuant to 28 U.S.C. §2255. The district court denied the motion and declined to issue a certificate of appealability. Petitioner has filed an application of a certificate of appealability. Fed. R. App. P. 22(b); Circuit Rule 22.1.

This court has reviewed the final order of the district

court and the record on appeal. We find no substantial showing of the denial of a constitutional right. 28 U.S.C. § 2253(c)(2).

Accordingly, the request for a certificate of appealability is DENIED. Petitioner's request for leave to proceed on appeal in forma pauperis is also DENIED.

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